

<sup>1</sup> Appellant also timely filed an application for review from the October 6, 2011 nonmerit decision of OWCP denying her request for further review of the merits of her case.

OWCP's April 26, 2002 wage-earning capacity determination. In a November 22, 2010 decision, OWCP denied appellant's request for modification of its April 26, 2002 wage-earning capacity determination. In a June 27, 2011 decision, an OWCP hearing representative affirmed OWCP's November 22, 2010 decision.

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>2</sup> Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.<sup>3</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

OWCP's procedure manual provides that the factors to be considered in determining whether the claimant's work fairly and reasonably represented her wage-earning capacity include the kind of appointment and the tour of duty. The manual states that reemployment may not be considered suitable when the actual earning job is part time, unless the claimant was a part-time worker at the time of injury.<sup>7</sup>

OWCP found that appellant's actual earnings in part-time reemployment for 20 hours per week fairly and reasonably represented her wage-earning capacity. Appellant was a full-time worker at the time of her November 13, 1998 work injury. As the above-noted procedure makes clear, the Director of OWCP has determined that when the tour of duty is not at least equivalent to that of the job held at the time of injury, OWCP will not consider the reemployment suitable for a wage-earning capacity determination. The Board finds, therefore, that OWCP abused its

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<sup>2</sup> See *Katherine T. Kreger*, 55 ECAB 633 (2004); 5 U.S.C. § 8115 (regarding determination of wage-earning capacity).

<sup>3</sup> See 5 U.S.C. § 8115.

<sup>4</sup> See 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>5</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>6</sup> *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

discretion in determining appellant's wage-earning capacity based on a part-time position.<sup>8</sup> The Board will reverse OWCP's June 27, 2011 decision.<sup>9</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 27, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 23, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>8</sup> *O.V.*, Docket No. 11-98 (issued September 30, 2011); *S.M.*, Docket No. 10-2382 (issued September 28, 2011).

<sup>9</sup> Given the Board's finding regarding OWCP's June 27, 2011 merit decision, it is not necessary for the Board to consider OWCP's October 6, 2011 nonmerit decision.